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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

CIRCUIT JUDGES DIXIE
HERLONG CHASTAIN, etc., et al.,

Petitioners,

-vs-

HILARY DAVIS, individually
and on behalf of all others
similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER FEDERAL HABEAS CORPUS LIES AS A REMEDY TO CHALLENGE THE ACTION OF A STATE IN DEPENDENCY PROCEEDINGS TO REMOVE CHILDREN FROM THE CUSTODY OF PARENTS.

II. WHETHER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION REQUIRES A STATE TO FURNISH AN INDIGENT PARENT COURT-APPOINTED COUNSEL IN ALL STATE DEPENDENCY PROCEEDINGS TO TEMPORARILY REMOVE CHILDREN FROM THE CUSTODY OF PARENTS.

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PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
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The Petitioners respectfully request that a writ of certiorari issue to review the en banc judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on March 23, 1981.

OPINIONS BELOW

The following opinions of the lower court are included in the Appendix

to the Petition:

1. Opinion of the United States District Court for the Southern District of Florida, rendered November 23, 1977, in this action.

2. Opinion of the United States Court of Appeals for the Fifth Circuit rendered June 6, 1980, in this action.

3. En banc Opinion on rehearing of the United States Court of Appeals for the Fifth Circuit rendered March 23, 1981.

JURISDICTION

The en banc opinion on rehearing of the Fifth Circuit Court of Appeal was entered on March 23, 1981. The issuance of the Mandate has been stayed until May 10, 1981. Jurisdiction to review this judgment of the Court of Appeals is conferred on the Court by 28 U.S.C., Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Fourteenth Amendment:

> Section 1 . . . [N]or shall any person of life, liberty, or property without due process of law; nor deny to any person

within its jurisdiction the equal protection of the laws.

28 U.S.C., Section 2254:

[set out in full in the Appendix hereto]

Sections 39.40, Florida Statutes, through 39.414, Florida Statutes (1979):

[set our in full in the Appendix hereto]

Sections 39.402, 39.407 and 39.41, Florida Statutes (as amended 1980):

[set out in full in the Appendix hereto]

STATEMENT OF THE CASE

This case has its origin in a class action in the Circuit Court of Dade County, Florida, challenging the constitutionality of any child dependency proceedings involving indigent parents when the parents are not provided with, or knowingly waive, counsel provided at the state's expense. The jurisdiction of the court was founded in 28 U.S.C., Section 2241, et seq. and 28 U.S.C., Section 1343(3) and (4). The complaint in one count, sought a Writ of Habeas

Corpus against judges of the Dade County Circuit Court to secure the release of a child from continuing custody or supervision by the Florida Department of Health and Rehabilitative Services[1/] and, in another count, sought declaratory and injunctive relief declaring the conducting of child dependency proceedings in Florida against indigent parents without providing them the opportunity for counsel at the state's expense to be unconstitutional.

Respondent HILARY DAVIS was the indigent mother of a 14-month-old son who was beaten by the child's father, resulting in the child receiving a fractured arm.

A petition of dependency, pursuant to Chapter 39, Florida Statutes, was brought with regard to the son on February 4, 1976. On March 4, 1976 a dependency adjudication hearing was held in the Dade

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1/William J. Page, then secretary of the Florida Department of Health and Rehabilitative Services and Florida Department of Health and Rehabilitative Services officials Max Rothman, Charles Hall and Jenet Vetter were defendants in the District Court proceeding, but have not been parties in the appellate courts.

County Circuit Court.

After hearing, the child was adjudicated to be a dependent child, to be placed in the temporary custody of the Division of Social and Economic Services of the Department of Health and Rehabilitative Services of the State of Florida, and Respondent Davis, who was not represented by counsel, was instructed to contact an attorney. Subsequently, on May 11, 1976, Respondent Davis, through counsel, filed a Petition for Writ of Habeas Corpus in the Supreme Court of Florida, seeking the return of the custody of her son. The Florida Supreme Court denied the Petition. Davis did not seek the direct appellate review of the United States Supreme Court.

The United States District Court for the Southern District of Florida granted summary judgment in favor of Respondent, Davis v. Page, 442 F.Supp. 258 (SD Fla. 1977), and the Petitioner Judges appealed. A panel of the Fifth Circuit Court of Appeals found, in pertinent part, in favor of Respondent that the due process clause of the Fourteenth Amendment requires that

parents in any Florida child dependency proceeding, whether for temporary or permanent custody, be advised of their right to assistance of counsel immediately following service of the petition for adjudication of dependency or seizure of the child and, if indigent, that counsel be appointed unless the parents knowingly and intelligently waive the court-established right to counsel. Davis v. Page, 618 F.2d 374 (5th Cir. 1980).

The Petitioner Judges sought rehearing en banc, which was granted. The en banc decision of the Court of Appeals, in a decision in which 13 judges joined, 11 judged dissented and two abstained (on the basis of preferring to defer decision pending this Court's pending decision in Lassiter v. Department of Social Services of Durham County, North Carolina, Case No. 79-6423) affirmed the prior opinion in pertinent part, except to vacate the injunctive relief against the state court judges. Specifically the Court held that the respondent parent was entitled to invoke federal habeas corpus jurisdiction to recover custody of her child, relying on the unreported opinion in Lehman v. Lycoming

County Children's Services Agency (3rd Cir., July 23, 1980), which opinion has subsequently been reversed on en banc rehearing by the Third Circuit, on March 31, 1981 (See 49 LW 2642, April 14, 1981).

The en banc court further held that this was not a proper situation for invoking the doctrine of abstention and reaffirmed that in all dependency proceedings pursuant to Chapter 39, Florida Statutes, due process requires that indigent parents be offered counsel and that counsel be supplied unless a knowing and intelligent waiver is made. In the dissent of 11 judges, the appropriateness of federal habeas relief was strongly disputed, as was the rejection by the majority opinion of the "case by case" approach to providing counsel, which had been enunciated by the Florida Supreme Court in Potvin v. Keller, 313 So.2d 702 (Fla. 1975), which relies upon Cleaver v. Wilcox, 499 F.2d 940 (9th Cir. 1975), the only federal Circuit Court of Appeals case on point.

From the majority opinion, this appeal is taken.

ARGUMENT FOR ALLOWANCE OF THE WRIT OF CERTIORARI

A. THE EN BANC DECISION OF THE DECISION OF THE FIFTH CIRCUIT COURT

OF APPEALS, WHICH DETERMINES THAT FEDERAL HABEAS CORPUS LIES AS A REMEDY FOR A PARENT TO CHALLENGE THE ACTION OF THE STATE IN CIVIL DEPENDENCY PROCEEDINGS TO REMOVE CHILDREN FROM THE CUSTODY OF THE PARENT, GREATLY EXPANDS THE BASIS FOR ASSERTION OF THE WRIT OF HABEAS CORPUS, IS IN DIRECT CONFLICT WITH THE DECISIONS OF THE FIRST AND THIRD CIRCUIT COURTS OF APPEAL, AND IS UNSUPPORTED BY THE DECISIONS OF ANY OTHER CIRCUIT COURT.

The en banc majority opinion of the Fifth Circuit in this case finds specifically that Respondent Davis was entitled to invoke federal habeas corpus jurisdiction, even though the child was in her custody prior to the District Court rendering judgment. The Court, with virtually no discussion asserted:

> . . . We decline the state's invitation to declare habeas relief inappropriate whenever the custody of a child is at stake. While domestic relations are normally within the province of state courts, nothing in the history of the habeas writ suggests that it should be denied merely

because the custody at issue results from a adjudication involving child custody. See Lehman v. Lycoming County Children's Services Agency (3d Cir. July 23, 1980). But see Sylvander v. New England Home for Little Wanderers, 584 F.2d 1103 (1st Cir. 1978).

This extension of the Writ of Habeas Corpus to child custody cases is novel, unsound and contrary to the law of the other circuits. Indeed, the very opinion upon which the en banc opinion relies, Lehman v. Lycoming County Children's Services Agency (No. 79-2466, 3d Cir., July 27, 1980), has been reversed on en banc rehearing. (See Lehman v. Lycoming County Children's Services Agency, 49 LW 2642 (3d Cir., March 31, 1981), in a decision in which the en banc majority accurately noted that habeas corpus differs from other constitutional challenges in that it is not subject to the doctrine of res judicata. That doctrine precludes a litigant who has fully pressed a claim in one court from obtaining a second adjudication of that claim. Habeas corpus, because it embodies considerations of personal liberty, is the major exception to the res judicata doctrine. The writ of

habeas corpus represents society's judgment that avoiding wrongful incarceration and unlawful restrictions on liberty outweighs the otherwise compelling interest in finality of litigation.

While the ability to avoid res judicata is an extraordinary characteristic of habeas when the relitigation takes place within the same judicial system, the writ assumes even more profound implications when its operations cut across the federal and state judicial systems. The awesome power of the writ to avoid res judicata, and its implications for federalism, demand that its use be confined to its proper role; the preservation of individual liberty and the relief from unlawful custody.

This is highlighted by the comments of Judge Brown in his dissent in this case:

> Once again this Court in the high name of the Constitution becomes involved by the majority in the most direct way in domestic problems wisely left to the states. Not only that, it is done by an order declaring unconstitutional prior decisions of the state's highest tribunal through the medium of an attack directed against innocent local state trial circuit judges, all of whom--including all other judges high and low in the whole state of Florida--are not categorically

> directed, without discretion or consideration of real needs, to conform to our edict. I think all of the principles of Federalism and the demands of comity are defeated by this action and I therefore dissent from this instrusion.
>
> Davis v. Page, 618 F.2d 374, 386 (5th Cir. 1980) (dissenting opinion)

Habeas lies to challenge unlawful custody, but unlawful custody is simply not the issue in a parental rights termination case. It is not the liberty interest of the children that is sought to be protected in such a case, but only the right of the particular parent to raise them. Such an interest is unrelated to the core concern of the writ of habeas corpus.

Since the enactment of the habeas corpus statute in 1967, the Supreme Court has never asserted habeas corpus as an appropriate remedy for litigating federal constitutional rights arising from state child custody disputes. Sylvander v. New England Home for Little Wanderers, 584 F.2d 1103, 1110 (1st Cir. 1978):

> . . . [T]he fact remains that over the many years since enactment of the habeas corpus statute in 1867, the Supreme Court has

> never acknowledges that habeas corpus is an appropriate remedy for litigating federal constitutional claims arising from state child custody disputes. In two child custody cases decided on federal question grounds (but arguably having jurisdictional connotations) the Court refused to authorize the writ. Matters v. Ryan, 249 U.S. 375, 39 S.Ct. 315, 63 L.ED. 654 (1919); in re Burrus, 136 U.S. 586, 10 S.Ct. 850, 34 L.Ed. 500 (1890). None of the cases implicating custody rights that have come before the Court reached the Court through the route of federal habeas. The Supreme Court's sweeping language in caces such as Hensely v. Municipal Court, supra, 411 U.S. 345, 93 S.Ct. 1571, 36 L.Ed.2d 141 (1973) and Jones v. Cunningham, supra, 371 U.S. 236, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963), concerned extensions of the writ of persons criminally accused who had obvious claim to be treated for federal jurisdictional purposes in the same manner as their incarcerated brethren, even if not confined in the strict sense.
>
> 584 F.2d 1103, 1110.

Further, Circuit Judge Brown, in his en banc dissenting opinion in this case notes astutely the problems which both the Sylvander and Lehman courts have indicated:

> From a strictly legal standpoint, I disagree seriously as to the appropriateness of Federal habeas relief in this case. The "custody" of Carl Davis which purportedly gave rise to Federal habeas in this case was not the type of "custody" which has traditionally formed the basis for habeas relief. Even a cursory review of the Court's opinion reveals that the primary interest being addressed is the interest of Ms. Davis as the parent in not being deprived of her child. . . .
>
> From the standpoint of the administration of justice and the maintenance of our cherished principles of federalism, I am acutely disturbed by the recognition of Federal habeas as an available avenue of relief in child custody disputes. First, I am not convinced that the interests of family and child will be significantly fostered by permitting actions such as these to be litigated in two sets of courts--first state, and then federal, or worse, perhaps simultaneously. Furthermore, I suspect that it will be difficult for our courts to place limits on the types of child custody cases which may be brought in Federal Courts through the habeas route. . . .

These analyses clearly indicate the significance of the use of habeas corpus as an avenue for review in child custody proceedings, and clearly presents an issue of substantial importance, especially when

considering the possible implications of extension of the doctrine into the area of custody conflict generally. The Fifth Circuit has sharply broken from the other circuits speaking on the matter, relying on the Lehman decision which has since been reversed, and this situation presents a clear basis and need for certiorari pursuant to Rule 17 of the Rules of the United States Supreme Court.

B. THE EN BANC DECISIONS OF THE FIFTH CIRCUIT COURT OF APPEALS EXTENDING THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION TO REQUIRE A STATE TO FURNISH AN INDIGENT PARENT COURT-APPOINTED COUNSEL IN ALL STATE DEPENDENCY PROCEEDINGS TO TEMPORARILY REMOVE CHILDREN FROM THE CUSTODY OF THE PARENT GREATLY AND IMPROVIDENTLY EXPANDS THE RIGHT OF COUNSEL DOCTRINE ORIGINATING IN GIDEON V. WAINWRIGHT, 372 U.S. 335, 83 S.Ct. 722, 9 L.Ed.2d 799 (1963), AND CONFLICTS DIRECTLY WITH THE OPINION OF ANOTHER CIRCUIT COURT OF APPEALS.

The en banc Circuit Court in this case has held that in dependency proceedings to which the State is a party and in which the custody of a child of an indigent parent is involved, the court hearing the matter must, as a constitutional mandate, provide assisgned counsel to the parent when desired and must inform the parent of the opportunity to have counsel so appointed. The Court specifically rejects the case-by-case approach to providing of counsel in temporary custody proceedings, as enunciated by the Florida Supreme Court in Potvin v. Keller, 313 So.2d 703 (Fla. 1975), which directly adopted the rule from Cleaver v. Wilcox, 499 F.2d 940 (9th Cir. 1974). Further, they do so in spite of the fact that the Florida Supreme Court has required the appointment of counsel in all cases where indigent parents are threatened with permanent loss of custody or when criminal charges may arise from the proceeding.[1/] It

1/Thus, this opinion is more extreme than that which is before this court in Lassiter v. Dept. of Social Services (U.S. Supreme Court, Case No. 79-6423) where the issue is the right of indigent parents to counsel in actions to terminate parental rights.

is only in cases which contemplate less serious consequences than the case-by-case approach comes into play. In the Interest of D.B. and D.S., 385 So.2d 83 (Fla. 1980).

One of the keystones of our criminal justice system is the right, found in the Sixth Amendment, that all individuals will have the assistance of counsel in criminal prosecutions regardless of their ability to pay for legal services. Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), and Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972).

However, despite the Sixth Amendment's literal entitlement to counsel in "all criminal prosecutions," the Supreme Court has qualified that guarantee. In Scott v. Illinois, 440 U.S. 367, 59 L.Ed.2d 383, 99 S.Ct. 1158 (1979), the Court declined to extend the right of appointed counsel to defendants prosecuted for petty offenses but not actually sentenced to jail. Excursions from the literal language of the Sixth Amendment are discussed by Mr. Justice Rehnquist, in Scott, supra, as follows:

> The number of separate opinions in Gideon, supra, Duncan, supra,

> Baldwin, supra, and Argersinger, supra, suggests that constitutional line drawing becomes more difficult as the reach of the Constitution is extended further, and as efforts are made to transpose lines from one area of Sixth Amendment jurisprudence to another. . . . The range of human conduct regulated by state criminal laws if broader than that of the federal criminal laws, particularly on the "petty" offense part of the spectrum. As a matter of constitutional adjudication, we are, therefore, less willing to extrapolate an already extended lin when, although the general nature of the principle sought to be applied is clear, its precise limits and their ramifications become less so. . . .

Scott, supra, at 440 U.S. 372

If the precise limits of the Sixth Amendment are indeed as ill-defined as Mr. Justice Rehnquist suggest, the cases already discussing right to counsel, such as Gideon v. Wainwright, must be applied to novel situations with caution.

The potential for incarceration is precisely what led the Supreme Court to extend the right to counsel to a quasi-criminal proceeding. In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). In its only extension of Sixth Amendment

principles to proceedings outside adult criminal prosecutions, the Court repeatedly stressed the criminal nature of juvenile delinquency proceedings.

The United States Supreme Court has not included the right to counsel in due process protections under the Fourteenth Amendment since Gault was decided in 1967, although the Court has certainly had the opportunity to do so. See Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1973); Wolff v. McDonnell, 418 U.S. 534, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); Baxter v. Palmigiano, 425 U.S. 300, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976). Cf. Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 636 (1973).

In other types of actions (herein denominated "civil" because the interests affected are other than the individual's personal freedom,) the procedures afforded require something else. The Court in Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950), considering the interest of the State of New York in employing judicial proceedings to settle trust accounts, laid down a principle of procedural due process that stands immutable today:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause, but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.
>
> Id. at 313 (e.s.)

The Court in Armstrong v. Manzo, 380 U.S. 545 (1965), set forth the principle that the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." See also Goldberg v. Kelly, 397 U.S. 254 (1970).

The only circuit other than the Fifth to address the issue of right to counsel in civil custody matters has been the Ninth Circuit in Cleaver v. Wilcox, supra. In Cleaver, relied upon by the Florida Supreme Court in Potvin, supra, and In the Interest of D.B. and D.S., supra, the Ninth Circuit Court chose not to impose upon the state court system an inflexible constitutional requirement that indigent parents receive court appointed counsel in every dependency proceeding. Instead, the court held that parents are entitled to a judicial decision on the right to counsel in each case.

> The determination should be made with the understanding that due process requires the state to appoint counsel whenever an indigent parent, unable to present his or her case properly, faces a substantial possibility of the loss of custody or of prolonged separation from a child.
>
> Cleaver, supra, at 945 [footnote omitted]

The court indicated that the right to counsel in juvenile dependency proceedings would be determined by the relevant circumstances in each case and that criteria for offering counsel to indigent parents would include (1) the potential length of parent-child separation, (2) the degree of restrictions on visitation, (3) the presence or absence of disputed facts, (4) the presence or absence of parental consent, and (5) the complexity of the proceeding in terms of witnesses and documents. This position has been adopted and followed by the Florida courts.[1/]

1/As noted by Judge Brown in his dissent in the initial Fifth Circuit decision, it may be that the state trial judge erred in not appointing counsel in this case. Such, however, is not sufficient basis for removing all discretion from the state courts to address the matter on a case-by-case basis.

The Fifth Circuit has thus taken a position novel to the federal appellate courts and in direct conflict with Cleaver v. Wilcox, supra, has extended the right to counsel originating in the Sixth Amendment, to civil custody proceedings, thus clearly raising an extremely important question which should be addressed by the United States Supreme Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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